UNITED STATES
v.
CLYDE L. WEEKLEY

IBLA 84-859 Decided March 29, 1985

Appeal from a decision of Administrative Law Judge L. K. Luoma holding the Cloverleaf Number 1, Bonnie Jean, Pink Elephant, and Pink Elephant No. 1 lode mining claims invalid. Contest No. CA-4991.

Affirmed.

1. Evidence: Burden of Proof--Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

> When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

2. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

> A discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

3. Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

> The "marketability test," a refinement of the "prudent man test," requires a claimant to show that a mineral can be extracted, removed, and marketed at a profit. The latter does not set forth a distinct standard, but

rather is regarded as complementary to the "prudent man test." Factors such as the cost of extraction, removal, and marketing are relevant considerations to determine whether a person of ordinary prudence would be justified in the further expenditure of time and means to develop a paying mine.

4. Appeals -- Mining Claims: Generally -- Rules of Practice: Appeals: Generally

Where a mining claimant appeals from an Administrative Law Judge's decision holding his claims invalid and makes vague assertions that prejudicial evidence was admitted at the hearing; that his expert witness was not permitted to testify that the claims could be mined profitably; and that the transcript was inadequate and incorrect, but offers no evidence to substantiate the assertions, such assertions will not serve as a basis for setting aside the Judge's decision.

5. Mining Claims: Discovery: Generally

Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit.

6. Mining Claims: Discovery: Generally

Isolated showings of high gold values are not sufficient by themselves to establish the discovery of a valuable mineral deposit.

APPEARANCES: Clyde L. Weekley, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Clyde L. Weekley 1/ appeals from a decision rendered by Administrative Law Judge L. K. Luoma, dated August 3, 1984, declaring the Cloverleaf Number 1, Bonnie Jean, Pink elephant, and Pink Elephant No. 1 lode mining claims invalid. 2/

On March 20, 1978, appellant, along with Goldie L. Weekley, Clyde Allen Weekley, and James Nathan Weekley, filed an application for patent with the Bureau of Land Management (BLM) for the Cloverleaf, Cloverleaf Number 1, Bonnie Jean, Pink Elephant, and Pink Elephant No. 1 lode mining claims. The

1/ The contest complaint and Judge Luoma's decision both named Clyde L. Weekley, Goldie L. Weekley, Clyde Allen Weekley, and James Nathan Weekley as contestees. Clyde L. Weekley was the only claimant who filed a notice of appeal.
2/ The claims are situated in secs. 3, 4, 9, and 10, T. 28 S., R. 40 E., Mount Diablo Meridian, Kern County, California.

application listed "lode or deposit bearing gold, silver, tungsten and cinnabar" (Exh. 2). BLM investigated the claims and approved the Cloverleaf lode mining claim for patent on July 12, 1982.

On July 12, 1982, BLM issued a complaint regarding the four remaining claims. The complaint charged that "[t]here are not presently disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery." Contestees filed a timely answer denying the charges and raising several affirmative defenses. An extended hearing was held on March 14, 1983, in Sacramento, California, and on September 13, 1983, in Bakersfield, California, before Administrative Law Judge L. K. Luoma. 3/

BLM's evidence was presented by BLM mining engineer, Robert Middleton. Prior to the field examination of the claims he studied 2 assay reports that were attached to the patent application (Exh. 2) and 11 assay reports subsequently submitted by Weekley to BLM (Exh. 9). These assays showed predominantly high values of gold and silver per ton of ore; however, only one report identified the claims from which the samples were taken, and none of the reports identified the actual sample locations or method of sampling (Tr. 24, 31).

On October 22, 1980, Middleton, accompanied by Weekley, commenced his field investigation. After the surface evaluation Weekley identified on a map of the claim area (Exh. 3) the sample locations from which the 11 assays (Exh. 9) originated. On October 23, 1980, Middleton, again accompanied by appellant, proceeded to take chip samples W-1 through W-9. Middleton testified as to the sample locations, the sample dimensions, and the methods of sampling.

The assay report for these samples was completed on November 24, and showed very low values of gold and silver with no significant amounts of tungsten or uranium. It was Middleton's opinion that none of the contested claims was worthy of patent (Tr. 71, 72).

On August 4, 1981, Middleton returned to the claims and took additional samples which he submitted for assay. The second assay report, completed on September 23, 1981, showed some evidence of mineralization on the claims but, like the first assay report, the percentages and weights were too low to be considered valuable (Tr. 94).

At the hearing Middleton was asked to determine the economic value of gold and silver per ton of material for each of the claims using the results of both assays and based on a stipulated price of gold at $ 415.75 per ounce and silver at $12.19 per ounce (Tr. 128). Although other metals and minerals were present in the samples the amounts were insufficient to contribute to the economic value (Tr. 131).

The Pink Elephant No. 1 showed no gold of value and a maximum silver value of $ 1.21 per ton. The Pink Elephant also showed no gold of value and

3/ References herein to the hearing transcript will refer to the Sept. 13, 1983, hearing.

a maximum silver value of $1.21 per ton. The Bonnie Jean showed no gold values and a maximum silver value of $6.09 per ton. The Cloverleaf Number 1 showed a maximum value of $4.15 per ton in gold and $1.21 in silver (Tr. 130).

Middleton testified that the costs of mining would be about $85 per ton, to realize a return between $1.21 and $6.09 (Tr. 131). He said that even if the scale of the mines were quite large, and there are no indications of large tonnages in any of the claims, mining costs would not be lower than $40 per ton (Tr. 132). It was Middleton's opinion that these four claims failed to have a discovery of valuable deposits of minerals which would justify patent (Tr. 100).

Stephen P. Ryland, a certified engineering geologist, testified on behalf of appellant. On May 17, 1983, he conducted a "reconnaissance-level" investigation of the claims to determine if there were sufficient indications of mineralization to warrant further study (Tr. 157).

He took eight chip samples (RW-3 through RW-10) from the four claims in issue. The assay results for these samples showed predominantly low values per ton, with two notable exceptions; samples RW-3 from the Cloverleaf Number 1 and RW-10 from the Pink Elephant. The economic value of the gold and silver per ton of ore according to this assay amounted to $ 437.36 for the Cloverleaf Number 1 (RW-3) and $358.97 for the Pink Elephant (RW-10) (Exh. A). To verify the results he reassayed RW-3 and RW-10 using the original samples. The second assay results showed much lower values. The Cloverleaf Number 1 (RW-3) reassayed at $ 5.38 per ton in gold and silver, and the Pink Elephant (RW-10) showed an economic value per ton of $35.04 (Tr. 148-49; Exh. A).

Ryland's professional opinion was that more investigation is needed to determine which assay is more representative of the true value of the claims (Tr. 182). However, he admitted that of all samplings assayed from the Cloverleaf Number 1 and the Pink Elephant, his first assays evincing high values were the most unrepresentative (Tr. 180-81).

Regarding mining costs, Ryland agreed that $85 per ton was a reasonable estimate. However, he said that if the operation was very small and utilized used equipment, the mining costs would be substantially lower, "but not less than half" ($42.50 per ton) (Tr. 188-89).

Assays of samples RW-4 through RW-9 showed low values of gold and silver per ton, although the values were slightly higher than BLM's. Ryland's opinion was that the value of gold and silver per ton as estimated from samplings of the Bonnie Jean and the Pink Elephant No. 1 is such that a person of ordinary prudence would not be justified in expending his labor and means with a reasonable prospect of success in developing a valuable mine on either claim (Tr. 186-87).

Ryland concluded that the mineralization in the area as evidenced on these claims warrants further exploration (Tr. 187). He does not believe there is sufficient exposure to make any sort of reserve estimate, which would be required for serious mining (Tr. 192).

In his decision, Judge Luoma concluded that the Government had established a prima facie case that the claims each lack discovery of a valuable

mineral deposit. Based on the testimony of appellant's witness, Judge Luoma concluded that the mineralization was not sufficient to warrant a prudent man to continue exploration on each of the claims. Judge Luoma held that "this falls short of having proved the existence of a valuable mineral deposit which would constitute a present valid discovery" (Decision at 8).

In his statement of reasons, appellant contends that prejudicial evidence regarding the fact that he lived on his mining claims was admitted at the hearing; that the Judge failed to consider testimony by a geologist proving that these claims could be worked profitably; that the transcript of the hearing is incomplete, in error, and completely inadequate; that he was denied the right to introduce evidence regarding the mineral survey; and that the Judge's conclusion that the claims are invalid, based on the mineral examiner's opinion that there are no minerals on the claims, is incorrect because the Judge stated that there were minerals on every claim.

[1, 2] When the Government contests the validity of a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence. Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). A valuable mineral deposit exists on a lode mining claim where there is physically exposed within the limits of the claim the vein or lode bearing mineral of such quality and quantity as to justify a person of ordinary prudence in the expenditure of time and money for the development of a mine and the extraction of the mineral. Thomas v. Morton, 408 F. Supp. 1361, 1371 (D. Ariz. 1976), aff'd, 552 F.2d 871 (9th Cir. 1977); Castle v. Womble, 19 L.D. 455, 457 (1894); approved, Chrisman v. Miller, 197 U.S. 313 (1905).

A prima facie case has been made, therefore, when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. Foster v. Seaton, supra; United States v. Jones, 72 IBLA 52 (1983).

[3] The "marketability test" is a logical complement to the "prudent man test." It requires a claimant to show that a mineral can be extracted, removed, and marketed at a profit. Factors such as the cost of extraction, removal, and marketing are relevant considerations to determine whether a person of ordinary prudence would be justified in the further expenditure of time and means to develop a paying mine. United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

[4] Appellant has offered no evidence to support his assertion that his case was prejudiced because evidence was introduced regarding the fact that he lived on his claim. Had BLM wished to charge that appellant's claims were not located in good faith because they were used for personal residence purposes rather than mining development, it would have done so in the complaint. See United States v. Zimmers, 81 IBLA 41 (1984). The sole charge in the complaint in this case was that "[t]here are not presently disclosed within the boundaries of the mining claims minerals of a variety subject to

the mining laws, sufficient in quantity, quality, and value to constitute a discovery." During the course of the hearing BLM counsel questioned appellant regarding the presence of the mobile home on the Pink Elephant. Judge Luoma stated, "The issues in this proceeding are the validity or invalidity of these claims" (Tr. 235). The Judge's decision is based solely on this issue and there is sufficient evidence in the record to support his holding that these claims are invalid. We do not find that appellant's case has been prejudiced by the introduction of evidence of this home on the claim.

We have reviewed the transcript, and we do not agree that the Judge failed to consider evidence by a geologist that the claims could be worked profitably. Appellant makes specific references to a statement made by the geologist that "they [the claims] would be in a sense ready to mine for a pilot plant operation, a very small scale" (Tr. 191). The fact remains, however, that the witness did not introduce any evidence to show that the gold could be extracted, removed, and marketed at a profit. See United States v. Jones, 67 IBLA 225 (1982).

Appellant makes a general assertion that a "proper transcript" was not made of the hearing because the clerk was incompetent and unable to properly record testimony. Appellant has not specifically pointed out any error, omission, or incomplete statement which would cause us to set this decision aside.

We do not find that appellant was denied the right to introduce evidence concerning the mineral examination of his claims. Testimony regarding the time spent on the mineral examination was given by Middleton. He testified that he spent about 5 hours in the field on October 22, 1980, and approximately another 5 hours on October 23, 1980 (Tr. 111). Appellant made no objection to the way the samples were taken at the time of the field examination (Tr. 76), nor has he offered any probative evidence tending to show that the samples taken by the Government failed to adequately represent the mineral value of the land. See United States v. Murdock, 65 IBLA 239 (1982).

[5, 6] Appellant asserts that the Judge's conclusion that the claims are invalid, which is based on the mineral examiner's opinion that there are no minerals on the claims, is incorrect because the Judge states that there are minerals on every claim.

The fact that some mineralization exists on the claims is not inconsistent with the Judge's holding that the claims are invalid. Although there is evidence of mineralization on these claims, such mineralization is not sufficient to meet the prudent man and marketability tests necessary for establishing a valuable mineral deposit. The high assay results submitted by appellant cannot alone establish the existence of a valuable mineral deposit. Isolated showings of high gold values are not sufficient to establish a discovery where there is no evidence that such showings are part of a continuous mineralization along the course of a vein or lode such that the quantity of ore can reasonably be determined by standard geologic means. United States v. Parker, 82 IBLA 344, 368-69, 91 I.D. 271, 285-86 (1984); United States v. Wells, 69 IBLA 363 (1983); United States v. Melluzzo, 38 IBLA 214, 85 I.D. 441 (1978), aff'd, Melluzzo v. Watt, Civ. No. 81-607 (D. Ariz. Mar. 31), aff'd, Civ. No. 83-2056 (9th Cir. Oct. 3, 1983). Also evidence of mineralization which may justify further exploration but not development of a mine, does

not establish discovery of a valuable mineral deposit. United States v. T. J. Jones, 72 IBLA 52 (1983); United States v. Arbo, 70 IBLA 244 (1983).

No reasons have been presented to persuade the Board to disturb the conclusion of the Administrative Law Judge that the four lode mining claims are invalid.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Will A. Irwin
Administrative Judge.